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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Magistrate Judge

IN RE FACEBOOK, INC., CONSUMER)
PRIVACY USER PROFILE)
LITIGATION.)

NO. 18-md-02843 VC (JSC)

San Francisco, California
Tuesday, April 6, 2021

TRANSCRIPT OF PROCEEDINGS BY ZOOM WEBINAR

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Judge Gail Andler, JAMS
Discovery Mediator

Tuesday - April 6, 2021

9:00 a.m.

P R O C E E D I N G S

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THE CLERK: Court is now in session. The Honorable Jacqueline Scott Corley presiding.

Calling Civil action 3:18-md-2843, In Re Facebook, Inc., Consumer Privacy User Profile Litigation.

And you can start.

MR. LOESER: Good morning, Your Honor. Derek Loeser from Keller Rohrbach with Cari Laufenberg, David Ko, and Chris Springer also from Keller Rohrbach.

THE COURT: Good morning.

MS. WEAVER: Good morning, Your Honor. Leslie Weaver of Bleichmar, Fonti & Auld with Matt Melamed and Anne Davis.

THE COURT: Good morning.

MR. SNYDER: Good morning, Your Honor, and good morning, Judge Andler. This is Orin Snyder from Gibson Dunn. With me on the Zoom conference are Deborah Stein, Russell Falconer, and Martie Kutscher Clark. I think that's it for our group.

THE COURT: Yes. That's all I see. Good morning.

MR. SNYDER: Good morning.

JUDGE ANDLER: Good morning, Your Honor. Gail Andler from JAMS.

THE COURT: Good morning, Judge Andler.

1 All right. So I understand, Judge Andler, you have agreed
2 to assist the parties with mediating their discovery issues,
3 and so thank you everyone for your statement.

4 Let me give you sort of my thoughts as sort of when I
5 threw out there this somewhat novel idea of a discovery
6 mediator -- maybe not so novel; maybe you've done that before,
7 Judge -- what I envisioned.

8 So I didn't appoint a special master. I sort of see
9 Judge Andler's role more akin to when the parties choose
10 private mediation -- right? -- you choose a private mediator to
11 help you resolve the entire case. Instead, here the parties
12 have selected a private mediator to help you resolve all those
13 little battles in the bigger case; right? So the discovery
14 dispute is sort of a small battle in there.

15 So I don't -- I want us to keep those roles the same so I
16 don't want recommendations from Judge Andler or anything like
17 that. I think that actually in some ways would make it harder
18 for her to do her job because then the parties would be sort of
19 posturing to get a recommendation out of her as well as
20 everyone having confidential, very candid, open communications
21 allowing her to use her experience to help you sort of come up
22 with a resolution.

23 And then in addition, the request about setting the rules.
24 So when parties choose private mediation, the judges, we're not
25 involved in any way other than we try to make sure the parties

1 have the discovery that they need to have a meaningful
2 mediation; right? So I leave that to Judge Andler. If she's
3 going to say to a party, "You need to have such and such here,"
4 I assume you will follow that because you-all retained her
5 because you actually want to move the discovery process
6 forward; but I really just view it just like a private mediator
7 except that she's mediating the discovery disputes.

8 And to that end, then, I would also think that just like
9 when I serve as a settlement judge, I don't have any
10 communications with the trial judge about the case unless I
11 have the parties' consent. So I would assume she may have
12 communications with me, but it would be with the parties'
13 consent.

14 And it could be something -- I would expect it would be
15 things like, "Judge Corley, the parties are going to -- we
16 weren't able to resolve this dispute. We narrowed it. It's
17 going to be presented to you in this format. What do you think
18 about that?" Maybe or not. It's completely sort of up to all
19 of you and Judge Andler how to do that, but that is also
20 another role is when you're unable and you're still at impasse
21 on something, she can then help you figure out -- because we
22 often have a lot of discussions just how it's going to be
23 presented, that she can help you figure out how to present it:
24 Timing, page length, all those kinds of things.

25 And as you know, I've signed every stipulation you've

1 submitted to me. If you submit me a stip, I will sign it. If
2 you come to agreement with her, I'll sign it, unless it's,
3 like -- it's going to be 50 pages. Well, I might sign it, but
4 I probably won't read it all.

5 So that's sort of how I see that. And I thought what
6 might be helpful now is to go through the parties' statement,
7 and there are a couple things I think I need to rule on but
8 then sort of give you examples of how I think Judge Andler may
9 help you address those things so that I don't have to then
10 rule.

11 And one reason why is it will be much faster that way, and
12 also it will be more accurate because you-all know your case
13 and what's going on so much better than I do, and Judge Andler
14 is going to know it as well because she's going to have the
15 privilege of spending more time with you.

16 So, anyway, does anyone have any just thoughts? So that's
17 sort of my thoughts. You wanted some guidance. Those are my
18 thoughts.

19 **MR. LOESER:** Sure. Thank you, Your Honor. We
20 appreciate the guidance. I think it's helpful for the parties.

21 I will say from the plaintiffs' perspective, the requests,
22 and some of which you went through, were made based on the
23 notion that we want to make sure that Judge Andler has the
24 authority and the tools that are helpful and necessary to move
25 disputes forward because what we really don't want to have

1 happen is to end up sort of stymied at this turn or stymied at
2 that turn; and if Judge Andler simply had some other tool that
3 she could utilize to move the parties forward, that that would
4 be provided.

5 So, for example, requiring the parties to have someone
6 with authority attend, if what you're saying is that's really
7 up to Judge Andler, if that's something she wants to request,
8 she can, then I think that that's helpful.

9 Similarly, if Judge Andler finds herself in the midst --
10 and I'm sorry for speaking as if you're not there --

11 **JUDGE ANDLER:** That's all right.

12 **MR. LOESER:** -- obviously you are, Judge Andler -- in
13 the midst of a dispute that's highly technical, she may find it
14 useful to have someone with some technical expertise come on
15 board to help get through that dispute.

16 And so really what we're saying is if it's okay for
17 Judge Andler in her role as discovery mediator to utilize to
18 ask the parties "Please do this and please do that," and that
19 that can be brought to bear, I think that would be very helpful
20 in moving disputes past everyone's just disagreeing to actually
21 getting to resolution.

22 **THE COURT:** Yeah. I mean, I assume you-all, when I
23 threw out that idea, you-all actually pretty readily agreed to
24 it of a discovery mediator because you want the process to
25 work.

1 But it is a voluntary process just like private mediation.
2 It's a voluntary process, but you-all selected Judge Andler
3 because of her, because I looked, her tremendous expertise and
4 knowledge; that, you know, I assume that if she asks for
5 something, you'll do it because that's why you selected her
6 because you actually want to try to move things forward a
7 little faster and more smoothly than I'm able to help you do.

8 **MR. SNYDER:** Thank you, Judge Corley.

9 Nice to meet you, Judge Andler. This is Orin Snyder from
10 Gibson Dunn.

11 Lawyers always say we're delighted to have you help us
12 reach agreement on discovery disputes, but in this case it is
13 heartfelt and sincere because I can say, and Judge Corley would
14 attest, this has not been the finest moment in efficient
15 discovery process, and so we truly do welcome your involvement.

16 And our goal is to resolve every discovery dispute without
17 having to hopefully bother Judge Corley again. She's been
18 incredibly patient, and both parties understand why she made
19 the suggestion. This is a case that taxes the federal
20 judiciary in a way that's not fair to other litigants and other
21 parties. So having a voluntary mediator like you is really the
22 best outcome that we can imagine here so we're looking forward
23 to it.

24 And we also agree that you should work with us to develop
25 the most flexible, efficient, fluid, fair, reasonable,

1 pragmatic approach to get us there; and so we're in your hands
2 to help us figure that out but, you know, we want to roll up
3 our sleeves and get discovery done. It's very costly. We have
4 a hundred people reviewing documents as we speak. We want to
5 get to the finish line so we can get to the next stage of the
6 litigation; and with your help, we're confident that we'll do
7 that so we look forward to that.

8 **THE COURT:** So if we can go through some of the
9 issues, and then I'll just sort of suggest where I think -- and
10 it's completely up to you guys and Judge Andler, but where she
11 might be able to assist.

12 So one of the issues is the document production. I
13 understand that Facebook proposed a schedule I think very
14 recently. But, again, that's something she can set up a
15 discovery mediation with the parties to sit down, and really I
16 think setting some deadlines would be very useful, and can talk
17 to you about what's realistic and how to get it done and
18 priorities and those kinds of things and hopefully work out
19 some schedule.

20 And even Facebook raised an issue of there being a lot of
21 nonresponsive hits that may also be something that she could
22 work with all the parties in coming up with something that
23 maybe reduces that that everyone's comfortable with.

24 The great thing about having a neutral that you trust --
25 right? -- is the neutral can sort of look under the hood and if

1 the neutral tells one side or the other something, you have
2 confidence in her that it's -- you don't just have to rely on
3 the other side; right? That's the nice thing about a neutral.
4 So I'm hoping that we can work out some deadlines there so we
5 can really get that discovery completed.

6 The same thing with respect to, you know, the 30(b)(6)
7 depositions. So what I envision is -- again, these are just
8 suggestions, I'm not ordering anything, which is, you know,
9 you'll have these regularly scheduled discovery mediations and
10 you'll have these agendas. One is the 30(b)(6). I think what
11 plaintiffs say and Facebook says sort of didn't meet in your
12 statement about what each side's position is; but, again, she
13 can sit there with you and help you get it out, get whatever
14 documents you want or not and if it's not, then get it
15 presented to me some way.

16 Let's see, a couple other things that I think maybe. One
17 is the testimony -- sworn testimony and written discovery from
18 the regulatory action. So let me ask Facebook. With respect
19 to the transcripts that you've agreed to produce, have you
20 identified for plaintiffs who those are that you have the
21 deposition or sworn transcripts?

22 **MR. FALCONER:** I'm not sure that we have, Your Honor,
23 but we'd be happy to.

24 **THE COURT:** Yeah. So I think you should do that
25 within the week as well as identify those that you're

1 withholding; right?

2 **MR. FALCONER:** From the noncustodians?

3 **THE COURT:** Yeah. I mean, I don't -- I'll just tell
4 you my view, which is if they gave testimony that's relevant to
5 the issues in this case, then it would be discoverable absent
6 there being some other reason why. It would be relevant. And
7 I don't know -- I know it's not deliberative process privilege
8 so we already went through that before.

9 But at a minimum within a week identify who you're
10 producing when and identify who you're not producing. And,
11 again, that can go on your agenda, and I've given you some
12 guidance with respect to that.

13 I don't know with respect to the -- yeah.

14 Then there's the issue of the letters. And I don't
15 know -- I don't know, like, what the plaintiffs mean by
16 "discovery responses"; right? So they've already produced the
17 documents, for example, that were produced to the FTC. So by
18 "discovery responses," what is it that the plaintiff is
19 referring to?

20 **MS. WEAVER:** Good morning, Your Honor. Lesley Weaver
21 for plaintiffs.

22 We discussed this a little bit at the last hearing.
23 Instead of propounding formal written interrogatories, the FTC
24 asked questions, substantive questions, and requested in their
25 letters sworn responses; and we then -- in the last hearing you

1 told us to identify those letters and Facebook should produce
2 the responses. So we've identified the letters, but we have
3 not received the responses.

4 **THE COURT:** Okay.

5 All right. And what is Facebook's position on that?

6 **MR. FALCONER:** So we received plaintiffs' requests.
7 We don't have an exact number, but it's 100 to 200 questions
8 that they've asked for responses for. It's taking us some time
9 to gather the responses and then assess them for the same kinds
10 of issues that we talked about at the hearing last time with
11 Your Honor. So we are in the process of doing that and happy
12 to confer with plaintiffs once we've completed -- just once we
13 have our arms around what did they ask for, what do the
14 responses look like, how much of it is responsive or
15 nonresponsive.

16 And, again, you know, we understood the Court to say
17 "Let's get kind of a narrowed request from plaintiffs and then
18 the parties can meet and confer about what should be produced
19 and what shouldn't"; and we think that's the kind of thing that
20 we could perhaps hopefully work through with Judge Andler on
21 some of the questions go outside the bounds of the case, some
22 of them are within; you know, what's a fair kind of reasonable
23 proportional scope of production kind of balancing relevancy
24 and burden concerns.

25 **THE COURT:** Well, I don't know that there's going to

1 be a great deal of burden if we're only talking about 100 or
2 200 questions and the answers; right? So I don't know that
3 there's burden.

4 You had raised before confidentiality issues or things. I
5 don't know that that applies either. I think it might be
6 Facebook's confidentiality in which case then it can be
7 produced subject to a protective order. So I think we need
8 something a little bit more definitive in terms of timing.

9 When did they provide you with the questions that they
10 wanted Facebook's responses to?

11 **MR. FALCONER:** My memory is maybe it was March 22nd,
12 but I'm going by memory so don't quote me on that.

13 **THE COURT:** Oh, all right. Does that seem about
14 right?

15 **MS. WEAVER:** Yes, Your Honor.

16 **THE COURT:** Okay. All right. So not tremendously
17 long ago.

18 All right. Put that on your agenda then.

19 **MR. LOESER:** Your Honor, if I may, just very briefly,
20 as you well know, we keep having arguments about relevancy and
21 scope; and so I would just ask if with that example of these
22 letters and everything else, if Facebook is going to be
23 withholding based upon some scope or relevancy contention, that
24 they tell us what it is so that if it's problematic, we can
25 bring that to Judge Andler or to you if it is a problematic --

1 **THE COURT:** You identified the questions, the 100 to
2 200 questions, that you want whatever Facebook's response was
3 to the FTC. So they need to tell you "We're producing these
4 responses"; and if there's some that they're not, they have to
5 identify specifically "We're not" and for what reason.

6 **MR. LOESER:** Okay. Thank you.

7 **THE COURT:** That's what you mean; right? Yeah. No,
8 they have to do that.

9 **MR. KO:** Your Honor, David Ko.

10 Just to follow-up on that, does your guidance at the
11 previous hearing with respect to the related deposition
12 transcripts in which you suggested that really they should only
13 be redacting for confidentiality and privilege grounds, does
14 that same guidance apply with respect to these written
15 responses as well?

16 **THE COURT:** Yes. I mean, right, there's going to be a
17 protective order. You can only use it for purposes of this
18 litigation and all those kinds of things, they can be produced
19 to that; but, yes, just like regular -- that's just what we do.
20 We don't redact for relevance.

21 **MR. KO:** Thank you, Your Honor.

22 **THE COURT:** All right. I guess, let's see, another
23 issue that I think would be terrific or might be helpful for
24 you to work with Judge Andler is there's the issue as to
25 whether Facebook has responded completely to the question of

1 identifying all companies that Facebook agreed to exchange
2 information with, and there's a dispute arising out of what was
3 testified to at the 30(b)(6).

4 That, to me, seems like an issue that -- right? -- you can
5 show Judge Andler, "Here's their deposition -- here's
6 Judge Corley's ruling, here's the deposition testimony, and
7 here's sort of" -- then the parties can just say what their
8 position is and she can help you work through it; right?

9 I mean, my hope is, like with all mediators, that you take
10 to heart -- when they have a view of something, that you take
11 it to heart and your position -- you may disagree or disagree,
12 but it may help shape your position somewhat and she may have
13 compromises or things in mind and creative things.

14 Okay. And then you agreed on all the search terms. Thank
15 you.

16 Just so you think, Judge Andler, they don't agree on
17 anything, they do, and actually have worked quite hard.

18 **JUDGE ANDLER:** Excellent.

19 **MR. LOESER:** And we agreed on Judge Andler,
20 Judge Corley.

21 **THE COURT:** And Judge Andler, yes.

22 **JUDGE ANDLER:** Thank you.

23 **MS. WEAVER:** In less than a year.

24 **THE COURT:** Yeah. That actually was pretty quick.
25 So now I'd actually like to talk to you about, unless

1 there's anything else, about the ADI documents, the app
2 developer investigation documents.

3 And sort of let me tell you what my thinking is about
4 that, and I did review the Massachusetts Supreme -- the Supreme
5 Judicial Court -- I can't remember -- the highest court of
6 Massachusetts decision; and my view is -- and also I think I
7 have the benefit, which they didn't have, at looking at some
8 documents in camera -- my view is, and this is what I'm going
9 to tell you my tentative view is, is that certainly the
10 investigation was done in anticipation of litigation, but also
11 I can't conceive of how it wouldn't have been done otherwise as
12 well; right?

13 I mean, Facebook wasn't going to let -- well, because they
14 said it. When they said to the public and to their users
15 "We're doing this to protect you," they didn't say "But our
16 primary purpose was to protect our shareholders"; right?

17 I mean, if they were immune from liability, they still
18 would have gone and looked back even though the platform had
19 changed; right? There are some apps that were suspended
20 because they were -- or you considered them to be bad actors or
21 concerned about that, and I think that would have been done.

22 All that's to say, though, there certainly are going to be
23 documents in there that are, A, attorney-client privilege; or,
24 B, attorney work product. For example, if Gibson Dunn made
25 edits to requests for information or those kinds of things,

1 that's classic work product that's not going to be
2 discoverable. Any advice that was given is not going to be
3 discoverable.

4 But in terms of the ADI team, at least from what I've
5 seen, it looks like a lot of that was just generated there
6 separate that may have then been reviewed but would have been
7 done anyway.

8 But also the way I was looking at it in looking through
9 and looking at those documents is that a lot of it I don't
10 think is relevant at all, and so what I wanted to know from
11 plaintiffs -- and this I sort of was thinking about it after
12 reading the Massachusetts case where the AG did much more
13 targeted discovery, and sort of get a sense from the plaintiffs
14 because I think this will be helpful.

15 Because I'm afraid I'm just going to rule on these 20
16 documents and then we're going to be back here with every
17 single document. I don't think plaintiffs need every single
18 document. There's certain information, like you say, that you
19 need and maybe it's not even going to be privilege. There's
20 going to be other information that may be privilege and I
21 actually think you don't even need.

22 So what is it precisely that the plaintiffs need from that
23 investigation?

24 **MR. KO:** Your Honor, this is David Ko. I can speak to
25 that first.

1 I think to directly answer that question, what we need and
2 what we've asked for and what we've identified in our brief are
3 the facts underlying the investigation that relate to our
4 claims, and in particular which apps were in violation or in
5 potential violation of which Facebook policies and over what
6 period of time these entities were in violation of these
7 policies and the specific conduct that caused them to be in
8 violation. And that's obviously relevant to our claims
9 regarding whether or not Facebook allowed third parties to
10 access user information and whether Facebook properly monitored
11 the disclosure of this information as they claim they did.

12 And so that really relates big picture, you know, our
13 argument that the facts underlying these communications are
14 what we're really seeking. That really I think responds to
15 your question most directly.

16 **THE COURT:** Right. So you don't need to know -- you
17 don't need to know, like, when a request for information was
18 sent. I know you've been provided responses to those so I
19 don't think I'm saying anything. You don't even know when it
20 was sent or re-sent or when the response was received or any of
21 those kinds of things. You want -- well, you have been
22 provided with the responses -- right? -- and the actual
23 requests that went out.

24 **MR. KO:** Correct.

25 **THE COURT:** And -- okay.

1 All right. So let me hear from Facebook. With that in
2 mind in terms of your privilege log, how does that change that
3 or does it, or maybe you already understood that?

4 **MS. KUTSCHER CLARK:** Your Honor, it's a little bit
5 difficult because this is the first time we're hearing this
6 request. To date we have never received an information
7 request. We just received a request for all of the ADI
8 documents. So I think this is definitely something we would
9 need to think about a little bit more.

10 I think what might make sense is if plaintiffs want to
11 issue a request, then we can look at it in context; but what
12 was a little bit tricky in the briefing was we were dealing
13 with a request for all of the ADI documents and then plaintiffs
14 said, "Well, give us the underlying facts," but we had never
15 received a specific request for specific facts.

16 **MR. KO:** Your Honor, I think that's a
17 mischaracterization. I think we've asked repeatedly about this
18 information. You know, we've conferred about ADI, as you know,
19 for well -- almost over a year now and we presented these
20 issues to Your Honor last June. You know, you accurately
21 ordered this privilege log to make sure that you had the proper
22 context.

23 And throughout those discussions, we have asked over and
24 over again that we obtain the actual facts underlying this
25 investigation; and if there's any doubt about this, this is

1 obviously included in our briefing. We made it clear that
2 that's what we wanted in our briefing and, in fact, we put it
3 in our proposed order. So I'm a bit surprised that
4 Ms. Kutscher Clark believes that this is the first time that --

5 **THE COURT:** All right. This is good because it's
6 giving Judge Andler a hint of why I thought a discovery
7 mediator would be useful.

8 So let me ask you this: Do you need information, then,
9 about apps that were investigated but Facebook in the end took
10 no action against?

11 **MR. KO:** Yeah. That's why I was very precise in
12 saying that there could have been a potential violation. We
13 need to know that -- we need to know the thought process, if
14 you will. I mean, not the privileged information but to the
15 extent there was an escalation but not an enforcement, that is
16 still relevant because that relates to whether or not they're
17 actually and accurately monitoring the disclosure of this
18 information as they suggest.

19 **THE COURT:** Okay.

20 **MS. KUTSCHER CLARK:** Your Honor, I think we need an
21 actual discovery request. I hear everything Mr. Ko is saying,
22 and of course we've discussed this extensively, but we do not
23 have any interrogatories asking for information like this.
24 Right now what I'm hearing is "We want all of the facts
25 underlying ADI," and that's a difficult thing to respond to.

1 So I think this needs to start with an actual request in
2 writing that we can look at and evaluate, and then we can
3 narrow it from there. But, you know, a request for any
4 information underlying ADI or, for instance, Mr. Ko is saying
5 any violation of a Facebook policy, Facebook has a lot of
6 policies. Some of those policies might be relevant here, some
7 of them might not be. So I think we need to see an actual
8 request that we can evaluate.

9 **MR. SNYDER:** Martie, can I jump in here?

10 Judge, we agree that a narrowing makes a lot of sense and
11 we're asking for a discovery request not to have form over
12 substance or to delay but to facilitate and hopefully we can
13 cut through all this because I think what you said makes
14 absolute sense.

15 For example, we've already given them the suspensions
16 list. That, they have. Escalations -- you know, a lot of the
17 escalations involved my firm and legal advice; some did, some
18 didn't. So if we see -- you know, "all the facts" is very
19 vague. We don't know what that means because we have thousands
20 of facts -- millions of facts, because we had investigators
21 looking at all myriad of things. So as precise a request as
22 they can make, then we can hopefully cut through a lot of this
23 and give them the nonprivilege stuff that is responsive and
24 relevant.

25 I mean, we really want to get through this ADI piece, but

1 right now we're kind of shooting in the dark because all facts
2 underlying the investigation, having been involved in that
3 investigation, I don't know what that means. I really don't.

4 **THE COURT:** That's not what they're -- I understand
5 that.

6 So then my next question is, because you had suggested,
7 I'm prepared then to rule on the motion but Facebook had
8 said -- and, as I said, my tentative view is I don't
9 necessarily agree with the Massachusetts -- well, I think we
10 all agree about the dual purpose doctrine and what the
11 Ninth Circuit rule is with respect to that. The Massachusetts
12 court kind of -- kind of applied the same rule. I mean, they
13 at one point did use the same rule, and without really any
14 analysis sort of came to the conclusion that it was -- well,
15 I'm not sure what it was. I'm not sure they were applying the
16 same rule as the Ninth Circuit.

17 So I'm prepared to issue a ruling, but I wanted to ask
18 Facebook about what they're -- I don't know what more you would
19 say, but I want to make sure it's fair because I understand --
20 it's clear that this investigation was set up with the intent
21 to make it privileged. That's clear. That's not dispositive,
22 but that's clear. So given that, I do want to make sure that
23 they are able to fairly present it, and so that's why --

24 **MR. SNYDER:** Because I would respectfully disagree
25 with the following: I think that because when it was set up,

1 it was set up for the reason you said because we wanted to
2 assure our users that the platform, you know, was safe and had
3 been safe in the past, but it was not set up so that we can --
4 so that we can shroud it in a privilege. It was set up -- it
5 was set up in a privilege way because we understood that to the
6 extent we have to take enforcement action, it would require,
7 you know, legal advice and the lawyers were embedded in and
8 involved in, you know, hundreds and hundreds of decisions on a
9 weekly, daily basis about escalation, about all manner of the
10 investigation.

11 So it wasn't just that lawyers were put in to make it
12 privilege. Lawyers were embedded in. In fact, we set up the
13 investigation because it required legal advice at every turn.

14 **THE COURT:** That may be what you're saying. I don't
15 know that I have seen -- I don't know that I have --

16 **MR. SNYDER:** I can --

17 **THE COURT:** I don't know that I've seen that. That's
18 why I want to ask: Is there anything else that you want to
19 present in an admissible format as opposed to the attorney --

20 **MR. SNYDER:** Yes. What I would like to do,
21 Your Honor, because my partner Alex Southwell was literally
22 living in Palo Alto with a number of my partners and associates
23 for weeks if not months, in the guts of this investigation,
24 again, not as a fig leaf but as lawyers practicing law and
25 advising the client, I think it would be helpful for the Court

1 in its determination for us to put in an affidavit where we can
2 outline in a nonprivilege way the extent to which legal advice
3 was involved at every step in the investigation.

4 That might even be helpful to the plaintiffs in then
5 identifying what it is they want to know because, as I said,
6 all of the -- all -- I don't know what percentage but a
7 substantial number of the decisions made by the investigators
8 on the field were made sitting next to lawyers, texting,
9 e-mailing with lawyers, at every turn. Hundreds -- I haven't
10 seen our privilege log, but it must be tens if not hundreds of
11 thousands of entries of iterative discussions between my team
12 and the investigators because they were living together for
13 months and months and months doing this investigation hand in
14 glove, hand in hand, shoulder to shoulder.

15 **THE COURT:** Yeah, but don't forget what the test is in
16 the Ninth Circuit is dual purpose and would the investigation
17 have occurred anyway; and it's inconceivable to me that if
18 Facebook had been immune from liability, that they wouldn't
19 have gone in and investigated the apps to see if there were any
20 other bad actors there.

21 That's just -- that's just inconceivable to me that, of
22 course, they would have gone in and investigated those apps;
23 and, therefore, my view is that those facts discovered, the
24 facts, not the advice given, the facts would be discoverable.
25 So I'm just saying that's what my view is, but I will allow you

1 to submit an affidavit.

2 And I know before I said no affidavits, but now having
3 looked at it all, I think that that would be a mistake --

4 **MR. SNYDER:** Thank you.

5 **THE COURT:** -- an error on my part to rule
6 definitively on that without doing that. And then, of course,
7 I'll let -- but, as you said, a nonprivileged affidavit.

8 **MR. SNYDER:** Yes, Your Honor.

9 **MR. KO:** And, Your Honor, will we be allowed to
10 respond to that affidavit?

11 **THE COURT:** Yes. You're going to get to see it and
12 then you're going to get to respond.

13 **MR. KO:** Because I think just to preview what -- you
14 know, Mr. Snyder, what I hear him saying is simply because of
15 the volume, that somehow this is all privilege. But as you
16 correctly pointed out, both the dual purpose and the facts
17 underlying the investigation is what we are entitled to.

18 And it's clear -- I mean, I get -- I understand that it
19 was a massive investigation, but just the sheer fact that it
20 involved lots of communications does not take away from the
21 fact that we would be entitled to the underlying facts
22 regarding the escalation of these apps and the subsequent
23 enforcement to the extent that was done. And so that's what we
24 are seeking and I think it's pretty clear what we would be
25 entitled to here.

1 **MS. WEAVER:** Your Honor, if I can --

2 **THE COURT:** That will shorten the privilege log if you
3 only did the sample privilege log for six apps greatly; right?
4 None of those e-mails about "Are you available for this
5 meeting?" or "Can we move it?" or "Should you change the weekly
6 report so that it has this information?"

7 **MR. SNYDER:** No.

8 **THE COURT:** You don't need any of that; right? You
9 just want the facts. You just want what's in the report.

10 **MR. LOESER:** Your Honor, I'm going to raise my hand,
11 and I have a question about this affidavit.

12 And if the notion is that Facebook is going to submit the
13 affidavit of a lawyer, I'm wondering how that works in this
14 case. That would appear to, then, be a witness.

15 And one of the central claims is a failure to monitor, and
16 I'm a little -- I guess I'm confused as to how a lawyer
17 testifying in this action about the work that that lawyer did,
18 some of which would be privilege, some would not, wouldn't be a
19 waiver of the attorney-client privilege or at least introduce a
20 lawyer as a witness. And I'm just throwing that question out
21 there wondering how that works.

22 **THE COURT:** I don't know. This is a perfect thing I
23 think for you-all to discuss with Judge Andler; right? So --
24 and I appreciate, Mr. Loeser, you being very candid about that.
25 Essentially you're, like, warning them, "Just because we're

1 sitting here doesn't mean if you submit some affidavit, that
2 we're not going to argue there's some waiver." And I
3 appreciate you being transparent about that, and Facebook will
4 have to think about that -- have to think about that.

5 And of course, then, there is the issue in Massachusetts
6 the court did hold that it was work product but that, you know,
7 the fact work product was discoverable in any event. And so
8 maybe this is a way of working through that as well and getting
9 that information. And you could, for example, show
10 Judge Andler a lot of those documents.

11 **MS. WEAVER:** Your Honor, and on a related note, you
12 know, to the extent that Facebook is raising as a defense in
13 this action to the negligence claims and the invasion of
14 privacy that they investigated and maintained users privacy,
15 we're entitled to discovery. So it's akin to the waiver
16 argument but it exists whether or not they put in a declaration
17 by a lawyer. If Facebook is going to rely on the investigation
18 as a defense, we should get discovery of it.

19 **THE COURT:** Well, that is -- sure. Of course. But I
20 don't know if that's the case. They'll have to make that
21 decision. Yeah, they'll have to make that decision.

22 Okay. So there we are. I've punted everything I think
23 except that within a week Facebook has to tell you which
24 deposition transcripts they're producing and which ones they
25 are not.

1 And, Judge Andler, it would be great if you were able to
2 join us on all of these hearings. I think that would be
3 useful.

4 **JUDGE ANDLER:** I'd be happy to. I just have to have
5 notice so that my case manager can let the counsel in my
6 arbitrations and mediations that are scheduled through 2022
7 know that we will have a later start in those sessions. So it
8 will be pretty easy for Matt to do that. So if counsel just
9 give enough notice, I'm happy to do that.

10 **THE COURT:** And we'll be by video.

11 **JUDGE ANDLER:** Great.

12 **THE COURT:** For as long as the Administrative Office
13 of the U.S. Courts allow us to be by video, we will be by
14 video.

15 **JUDGE ANDLER:** Thank you.

16 **THE COURT:** So I'm hoping that will be permanent.

17 **JUDGE ANDLER:** Thank you.

18 **THE COURT:** So why --

19 **MR. LOESER:** A lot of people agree with you,
20 Your Honor.

21 **THE COURT:** Yeah. No, I know. Yeah. I have a lot of
22 these cases right now that I'm managing that have attorneys
23 from all across the country and it just makes so much sense,
24 unless you're an airline.

25 So shall we meet again in, say, three weeks you think?

1 **MR. SNYDER:** Sounds good.

2 **THE COURT:** Yeah. How about April 27th? And is
3 8:30 better?

4 Let me ask Judge Andler. We can start earlier at 8:30 if
5 that's better.

6 **JUDGE ANDLER:** That's usually much better for me if
7 it's not inconvenient for counsel and the Court.

8 **THE COURT:** I think we've done that. Why don't we do
9 April 27th, then, at 8:30 a.m. And I expect between now and
10 then you will meet and mediate your little cases.

11 All right. Great. Thanks, everyone. I hope you have a
12 vaccine plan if you don't already have a vaccine. Soon it will
13 be open to everyone.

14 **ALL:** Thank you, Your Honor.

15 **JUDGE ANDLER:** Thank you, Counsel, and we will be in
16 touch so we can set something up.

17 (Proceedings adjourned at 9:37 a.m.)

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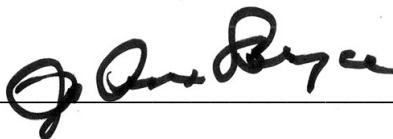
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, April 7, 2021

A handwritten signature in black ink, appearing to read "Jo Ann Bryce", is written over a horizontal line.

Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter